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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

S Smisko

THE STATE OF ARIZONA,)
)
Plaintiff,)
)
vs.)
)
STEVEN CARROLL DEMOCKER,)
)
Defendant.)
)

P1300
No. 1 CR 2008-1339

BEFORE: THE HONORABLE THOMAS B. LINDBERG
JUDGE OF THE SUPERIOR COURT
DIVISION SIX
YAVAPAI COUNTY, ARIZONA

PRESCOTT, ARIZONA
TUESDAY, SEPTEMBER 22, 2009
3:01 P.M.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
HEARING ON MOTIONS

ROXANNE E. TARN, CR
Certified Court Reporter
Certificate No. 50808

SEPTEMBER 22, 2009
3:01 P.M.

APPEARANCES:

FOR THE STATE, MR. JOE BUTNER.
FOR THE DEFENDANT, MR. JOHN SEARS, MR. LARRY
HAMMOND, MS. CAMPBELL.

THE COURT: This is State versus Steven
Carroll DeMocker, CR 2008-1339.

Mr. Hammond, Mr. Sears, Ms. Chapman, here
on behalf of Mr. DeMocker, who is present. Mr. Butner is
here on behalf of the County Attorney's Office, representing
the State.

We have reset this matter from
August 25th, and that day I did receive a motion from the
defense, an alternative motion to dismiss the death penalty
notice for lack of probable cause or, in the alternative, for
probable cause hearing on noticed aggravating circumstances.

The next day, August 26, I received a
defense motion for re-examination of conditions of release,
and I also, previous to that, had a State's motion and order
for release of victim medical records.

And I think, subsequently, received a
further State's motion -- and I am not sure that this is
right for today -- but to compel UBS to comply with other
things than what they already have with regard to a subpoena.

So State and defense ready to proceed,

1 Mr. Butner?

2 MR. BUTNER: State is ready, your Honor.

3 THE COURT: Mr. Sears?

4 MR. SEARS: Defense is ready, your Honor.

5 THE COURT: What would you like to take up
6 first? Has the issue of the medical records been resolved?

7 MR. BUTNER: No. It hasn't, Judge. In fact,
8 Mr. Kottke sent me letter that said, well -- first of all,
9 let me explain.

10 I called Mr. Kottke and said, you know,
11 "What's the problem with the medical records," et cetera, and
12 he indicated, "Well, we've already provided them to
13 Mr. Sears, and you can get them from Mr. Sears." And then he
14 said, "We don't have any objection, anyway."

15 And I said, "Well, please execute the
16 HIPAA releases, just to be safe. We haven't gotten the
17 medical records yet." And today I stand before you, we still
18 don't have any medical records.

19 Mr. Kottke sends me a letter that says
20 get them from Mr. Sears, basically, and also notes that they
21 will continue to assert the attorney-client privilege in
22 regard to the divorce records that are in possession of
23 attorney Robert Fruge.

24 In our conversation, Mr. Kottke indicated
25 that he thought that they would waive privilege in regard to

1 those, too, but then in his written response on September 15,
2 he indicates they are asserting that privilege.

3 THE COURT: You received a response last week.

4 MR. BUTNER: Yeah. The long and the short of
5 it being, don't have the medical records.

6 Judge, please just order them. That way
7 we can get them without further chasing our tails or chasing
8 Mr. Sears's tail or chasing Mr. Kottke's tail or somebody
9 else's tail. Thank you.

10 THE COURT: Do you need to be heard on this,
11 Mr. Sears?

12 MR. SEARS: I think I do, maybe just to
13 correct a couple of assertions that I just heard here, Your
14 Honor.

15 Here is where we are with respect to the
16 medical records. The medical records, actually, as far as we
17 can determine, consist of some bone scan imaging done at the
18 hospital in connection with the autopsy performed by Dr. Keen
19 on July 3rd of last year, apparently because Dr. Keen did not
20 have -- himself and the medical examiner's office -- the
21 equipment necessary to do that work himself. There are no
22 other records that I am aware of that are either being sought
23 by the State or are being protected by the personal
24 representative.

25 I have told Mr. Butner, both directly and

1 in e-mails, the following: That we had obtained a release
2 from Katie DeMocker addressed to our mitigation specialist,
3 Mr. Hudson, and that we were obtaining those records, and
4 that when we got them, we would provide them to Mr. Butner.

5 About ten days ago I got an e-mail from
6 Mr. Hudson saying that he had finally heard back from Yavapai
7 Regional Medical Center. They had sent him payment
8 information, which he had turned around and sent back to them
9 and was waiting for those records. So those are the records
10 that I think are out there, and that is the status.

11 It has always been our intention to
12 provide them directly to Mr. Butner. We are certainly not
13 hiding them. We are not conspiring with Katie DeMocker to
14 keep them from the State. We are interested in them, and we
15 have no interest in keeping them from the State.

16 It seemed simpler, under the
17 circumstances, for us to get them in the way we did, because
18 we were ahead of the game. If Mr. Butner had the release
19 today, he would be in line behind us. So I don't think there
20 is going to be a problem. I think they're coming shortly.

21 Nor have I heard directly from Mr. Butner
22 what, if anything, the lack of those records has done to
23 delay their investigation in this case. The autopsy work and
24 Dr. Fulginiti's work was done many, many months ago, in this
25 case. So that is the state of that.

1 Another thing that I have advised --

2 THE COURT: Before I leave that, then, do you
3 think you need an order from me to have YRMC produce them?

4 MR. BUTNER: Yes.

5 THE COURT: So ordered.

6 I've signed the order, Mr. Butner. If
7 you need to get them separately from YRMC, you may.

8 MR. BUTNER: Thank you, Judge.

9 MR. SEARS: There is one other part.

10 THE COURT: Back to you, Mr. Sears. Sorry for
11 the interruption.

12 MR. SEARS: That's fine. I just wanted the
13 Court to understand that we weren't interfering in any way
14 with this. We were trying to do it as expeditiously as
15 possible. But frankly --

16 THE COURT: But you don't have them yet
17 either, at this point.

18 MR. SEARS: No. And we really don't care if
19 the State gets them directly and gives them to us or vice
20 versa. It makes no difference. I think we're both aiming at
21 the same thing here.

22 THE COURT: One hopes.

23 MR. SEARS: Thank you. Now, with respect to
24 the divorce records and Mr. Kottke's involvement in this
25 case. As the Court knows, Mr. Kottke is a lawyer who

1 practices in tax and estate planning work. He is not a
2 litigator, and he is not a criminal defense attorney. And he
3 has told me a number of times, and I am sure would tell the
4 Court, that there is a point in this case at which he reaches
5 a level of discomfort, and he feels that he is there.

6 As a result, my understanding is that
7 Katie and Charlott intend, finances permitting, to retain
8 separate counsel, who is someone who would practice in this
9 area, who can directly respond to Mr. Butner. We've told
10 Mr. Butner that, and I think the letter that he is pointing
11 to in his file from Mr. Kottke mentions that same fact.

12 So, again, it's not as if the estate is
13 stonewalling the State on this case. It's just that
14 Mr. Kottke does what he does very well and is smart enough
15 not to venture into areas beyond his area of expertise. But
16 we expect that that would happen pretty shortly, and that
17 independent counsel for Katie and Charlott would be in a
18 position to deal directly with Mr. Butner about that issue
19 and about other issues that Mr. Butner has raised with
20 Mr. Kottke.

21 So I wanted to report that information to
22 the Court, to correct any suggestions that any of the
23 DeMockers, including the DeMocker daughters, are in any way
24 trying to stonewall or interfere or otherwise cause problems
25 for the State in this case. I think it's just the contrary.

1 THE COURT: Thank you. You filed a motion,
2 that I mentioned, alluding to the probable cause for the
3 death penalty issues. Obviously, I've heard some degree of
4 evidence already, but the motion was phrased as an
5 alternative for probable cause hearing, with regard to the
6 noticed aggravated circumstances. And I am aware of and have
7 read the -- it's Chronis -- Judge Steinle's position in that
8 case that just came down in June, and I've read that.

9 So I recognize that you are entitled to
10 such a hearing and to develop additional evidence or have the
11 State develop additional evidence to what I have already
12 heard. I guess I need to know how much time that's going to
13 take and what additional you all want me to hear.

14 MR. SEARS: Your Honor, did you see my reply?

15 THE COURT: I saw the reply, and I note that
16 the State was late in terms of its response, but I also note
17 that the request was made in the disjunctive and alternative
18 and that the alternative was asking for additional hearing on
19 the matter. So I am willing to grant the hearing, if you
20 think I need to hear any additional evidence.

21 The question is: How long is it going to
22 take? When could both sides be ready for that?

23 MR. SEARS: If I could just be heard, Your
24 Honor. Given that this is a capital case on that very issue
25 regarding the untimeliness of the State's response to this

1 tremendously important motion and how that, we think, impacts
2 this case and perhaps pre-stages a much larger problem
3 regarding how this case is proceeding, I tried to draw those
4 issues out in my reply.

5 It was very difficult for us to
6 understand, and it remains equally difficult for us to
7 understand today how the State could simply allow an obvious
8 deadline on a motion as critically important as this, to
9 simply go by with no effort whatsoever to contact us, to ask
10 for an extension of time for any reason, nor to do what
11 custom and practice normally requires, which is to file a
12 motion in large time before the time expires.

13 And in fact, to us it looks like nothing
14 happened until I sent an e-mail on Wednesday the 16th, very
15 early in the morning, to Mr. Butner, saying that we were
16 going to file a motion now seeking to have this treated as an
17 unopposed motion, and that we wanted to be sure that there
18 wasn't some claim or problem that they hadn't received our
19 original motion. I never did hear back from Mr. Butner.

20 What I got instead at the end of the day
21 was an e-mail from his office with these pleadings saying
22 they were going to be filed at the end of the day. And I
23 don't want to suggest that we are simply exalting form over
24 substance here, Your Honor. Here is where we see this is a
25 very real problem in this case.

1 Mr. DeMocker has been in jail, now,
2 eleven months -- eleven months tomorrow. This case is not
3 set for trial until May of next year. The State --

4 THE COURT: That was at request of both sides,
5 though.

6 MR. SEARS: It is, Your Honor. But let me
7 tell you what our great concern is.

8 Our great concern is this: You set, on
9 May 12, discovery cutoff for the State of June 22nd. You
10 told the State, in that hearing, that if they had material
11 that they wanted to disclose after that date, they could do
12 so with leave of Court on good cause shown. It would appear
13 to us that the State has basically not taken that order of
14 the Court to heart.

15 At this point today, as I stand here, we
16 have not received one single piece of discovery, not one word
17 from Mr. Echols, their financial fraud expert. And we know
18 that Mr. Echols began working on this case in December of
19 2008. We know that, in addition to the subpoena that is
20 attached to the motion to compel that's been filed this past
21 week, there were three earlier subpoenas directed to UBS for
22 documents. So Mr. Echols has had, in addition to the UBS
23 documents, subpoenas issued by the County Attorney's Office
24 for bank records, for other financial records, and has been
25 working on this case since early December of last year.

1 June 22nd came and went. Nothing from
2 Mr. Echols. Nothing from the State.

3 September 22nd is here, Your Honor, three
4 months after the discovery cutoff. Not a word.

5 The State files this request for a
6 delayed response to our death penalty motion, saying they are
7 in critical need of information from UBS so that Mr. Echols
8 can produce some sort of a report. They don't explain what
9 it is, how it relates to it or, most importantly, any reason
10 why Mr. Echols's work has not been disclosed at this point.

11 So here is my concern: We take your
12 calendar and we pick a hearing date for the Chronis hearing
13 in this case, and the day before the hearing, Mr. Echols
14 delivers us a report. Mr. DeMocker can't possibly be ready
15 to go to a hearing under those circumstances.

16 I've asked you to enter an order doing
17 three things: Confirming the June 22nd discovery cutoff,
18 which I think the State needs to hear from you, and entering
19 an order stating that the State will be precluded from
20 offering, again, ever, any late disclosed or undisclosed
21 evidence or material, unless they've obtained leave of court
22 to do that.

23 In addition, they noticed the existence
24 of a blood spatter and crime scene expert, Mr. Rod Englert of
25 Oregon. We have not seen one word from him in this case.

1 And yet the State, in their response, talks about crime scene
2 evidence.

3 They have noticed a man named Kiviyat as
4 a forensic photography expert. Not a shred of information
5 from him. In fact, not a shred from any expert in this case.
6 No new tire track, footprint tracking, any forensic expert in
7 this case.

8 And we are fearful, because now we have
9 seen it happen, that the State will essentially say, well,
10 here it is June 22nd, doesn't apply to us, it doesn't apply
11 to this, and if you are not ready, then we will delay this
12 some more. And the reason we are concerned is because that
13 is the precisely what they have done here, Judge.

14 They have filed a motion saying -- they
15 have filed a late response with no explanation for it being a
16 week late, which cut into my reply time -- my reply is
17 actually due today, based on their filing -- with no
18 explanation. Not the courtesy of a phone call or anything.
19 Just a "we're sorry," after the fact.

20 Then they file, in that same motion, a
21 request for leave to file a delayed response, based on this
22 naked assertion that they need information from UBS before
23 Mr. Echols can finish his work. Think about what they are
24 asking the Court to do.

25 The subpoena that they are talking about,

1 that is attached to their pleading, was issued on April 16 of
2 this year. It is, I think, the fourth such subpoena to UBS.
3 It was responded to, as you can see from their attachments by
4 Mr. Henzy on behalf of UBS, in full, completely in detail,
5 one month later, May 18 of this year.

6 We don't see a single word from the State
7 saying that the May 18th submission by UBS was incomplete or
8 unsatisfactory, until they need more time to prepare for the
9 Chronis hearing. And then all of a sudden, three months
10 later, and after the discovery cutoff goes by, they file a
11 motion to compel -- which I agree with the Court is not ready
12 to be heard today. Mr. Henzy obviously has a right to be
13 heard.

14 But this is what I think is going to
15 happen: I think it is very clear, from what I know about
16 this, that UBS has no intention of giving up customer
17 information of Mr. DeMocker's in their possession to the
18 State without a Court order. And they indicate that if such
19 a Court order is eventually obtained, they will appeal in
20 this case.

21 So the delay that Mr. Butner is proposing
22 requires Mrs. Butner to litigate with UBS. Then, if
23 Mr. Butner prevails at some unspecified time, perhaps months
24 in the future, then to get that information to Mr. Echols,
25 who will do something with it and produce something, which we

1 will then have to evaluate and respond. The indefinite
2 nature of that delay is stunning.

3 We are not talking about -- as far as I
4 can tell from Mr. Butner -- a week or two or three. We could
5 be talking about months over months before he gets that. Nor
6 has he made any real showing, other than conclusory
7 statements that this information from UBS is critically
8 important, to explain, A, why he did nothing about it until
9 last week, even though he knew on May 18th, presumably, that
10 the response was not adequate. That's what he is claiming
11 now.

12 He did nothing about it before the
13 discovery cutoff went by. He has not yet even today asked
14 for leave of Court to have late disclosed or undisclosed
15 information from Mr. Echols deemed admitted in some
16 proceeding in this case.

17 There is no way, if this conduct is some
18 precursor of what is to come, that this case is going to be
19 able to go to trial. If the State can do this, if the State
20 can continue to investigate this case on its own schedule at
21 its own pace and we are compelled to scramble and respond to
22 it, it will be impossible for us to be ready to go to trial.

23 We disclosed to Mr. Butner that we had
24 discovery, and we sent him a letter and said we have it on a
25 CD. And just as we have to pay for their discovery, it cost

1 us \$78 to compile the CD. Send us a check for \$78, and we'll
2 send you the CD. I never heard from Mr. Butner. You know, I
3 don't have any interest in doing that. I will just hand it
4 to Mr. Butner. I don't need the \$78.

5 MR. BUTNER: Thank you, Mr. Sears.

6 MR. SEARS: I asked for \$78, and we will just
7 take care of that.

8 But we are doing our best to keep this
9 case on track for trial, Your Honor, but this is the concern
10 we have. This is why we filed this reply. We are not in the
11 business, I would submit, of nickel and diming around the
12 edges of the rules.

13 We are genuinely and sincerely concerned
14 that unless something changes and changes soon about the way
15 the State is pursuing their investigation in this case, that
16 we will never be able to get this case to trial anywhere near
17 May of next year, and that's the reason.

18 Now, having said that, I think that these
19 issues and the way in which the State is investigating this
20 case have some implication in what Mr. DeMocker's release
21 conditions should be, and in a while, when we get to that
22 part of today's hearing, I will talk again about that.

23 But I wanted to let the Court know the
24 degree to which we are genuinely upset about what is
25 happening. It is not a personal dispute with Mr. Butner and

1 the County Attorney's Office. This is a capital case with
2 the defendant in custody.

3 And we have, as you said, picked this
4 court date because we thought it was realistic and it could
5 happen. But now because of the way things have positioned
6 themselves, we are not so sure, anymore. And this is the
7 first instance where it is clear to us that unless something
8 happens at this point, this case is going to fall completely
9 off the rails, and we are going to lose control of what needs
10 to be done in this case.

11 One final point: We have told the Court
12 that we would continue trying to work with the County
13 Attorney's Office to schedule interviews and evidence
14 review. I have sent Mr. Butner an e-mail first proposing
15 some specific dates, which have come and gone with no
16 response about scheduling them, and I have sent him another
17 e-mail saying essentially that because we have the manpower
18 on the defense side, pick any date. We will cover, within
19 reason, any date for this work.

20 We have at least two or three more days
21 of evidence review. We did two full days and went through
22 most of the documentary evidence. We have not looked at any
23 of the physical evidence on this case.

24 We have come to a complete standstill on
25 witness interviews in this case. I talked about it last

1 month when we were here. Nothing much has happened since
2 then. I am still available, essentially, and I will
3 represent to Mr. Butner and the Court any day -- any day from
4 now to get this work done.

5 But if we don't start doing that soon,
6 that will become another separate, equally compelling problem
7 in getting this case in line for trial in May. I don't mean
8 to be overly dramatic, Your Honor, but this is terribly
9 concerning to us.

10 And frankly, we are at a loss to
11 understand how the State can treat a death penalty case and a
12 motion -- the first real substantive motion dealing with the
13 death penalty in such a manner. It just stuns us. Thank
14 you.

15 THE COURT: Mr. Butner.

16 MR. BUTNER: Judge, I am not going to
17 grandstand on this issue, but I will start with Mr. Kottke's
18 letter, which is addressed to me, with a copy to Katherine
19 DeMocker, personal representative. And it just amazes me how
20 Mr. Sears knows the contents of this letter. He isn't even
21 copied on it, and yet he knows what Mr. Kottke told me. That
22 is just starting with the medical records, which we asked for
23 months ago. Okay?

24 It is interesting that Mr. Sears knows
25 that UBS has no intention of giving up customer information,

1 when I finally got to talk to Mr. Henzy personally today
2 before I came over here, and Mr. Henzy told me that today,
3 for the very first time.

4 I think what is going on here is, yeah,
5 there is foot-dragging all right, and the foot-dragging is
6 from the other side of the aisle, Your Honor. And the
7 foot-dragging is from Mr. DeMocker's employer, who is being
8 represented by Mr. Henzy. I have been trying to get ahold of
9 him for weeks. He informed me he was out of the country. He
10 had taken a trip to Ireland.

11 I have been trying to get some interviews
12 of a couple of people that Mr. DeMocker had contact with --
13 basically, he worked for. As a result of these lack of
14 interviews that I have been trying to schedule through
15 Mr. Henzy, I don't have complete financial information. It's
16 not intelligible to Mr. Echols.

17 And I point out -- if I understood the
18 Court's ruling about disclosure on the 22nd of July, the
19 cutoff, the ruling was that expert analysis could come later.
20 And in fact, what the State did was -- we had a guy living in
21 Phoenix, basically, copying all of these computer records and
22 so forth, and doing it as quickly as was possible to get it
23 disclosed to the defense, and now we have had those records
24 being analyzed. And Mr. Echols is almost done. And I had a
25 meeting with him a couple of days ago, but he isn't done yet.

1 Actually, it was yesterday I had the meeting with him. He
2 isn't done yet. I hope I will have something very soon. I
3 can't say exactly when.

4 Similarly, I don't have a report yet from
5 the blood-spatter expert. But you heard Mr. Sears note that
6 he was disclosed.

7 I don't have a report yet from the
8 lighting expert, but you heard Mr. Sears note he was
9 disclosed. Those are all disclosures that were made in
10 accordance with the Court's order.

11 The pre-staging of a much larger problem.
12 Yeah, the much larger problem is that we encounter a
13 stonewall effect -- and that is the word that Mr. Sears
14 used -- whenever we bump into Mr. Kottke, who represents the
15 estate, or Mr. Henzy, who represents UBS, and who also
16 represents Mr. Farmer in this matter, and who probably is
17 going to represent Mr. VanSteenhuyse -- if I am saying his
18 name correctly -- but who doesn't represent Miss Onnon,
19 because she's got a separate attorney, and that is
20 Mr. Terribile -- I hope I said his name properly.

21 And what we are trying to do is
22 coordinate through all of these lawyers, and we are bumping
23 into a stonewall at every level.

24 Judge, we are trying to disclose
25 everything as quickly as possible. When Mr. Henzy responded

1 to those subpoenas, he didn't say "I am not sending this and
2 I am not sending that, and I am objecting to this and I am
3 objecting to that." He didn't do that. Okay?

4 The materials were provided. They were
5 being analyzed by Mr. Echols. Mr. Echols then got with me
6 and said, "Look. It looks like all of this stuff is not
7 there. Okay? It looks like all of this stuff is not there."
8 There were four categories, is my recollection.

9 And so we are looking at this stuff,
10 trying to figure out what is not there. That's not easy to
11 do.

12 That's why I finally, since I could never
13 get ahold of Mr. Henzy -- I finally filed a motion to bring
14 the records. Let's have an in-camera inspection and see what
15 is there and what is not being provided and what is being
16 asserted as being privileged. Didn't have a response that
17 did that from Mr. Henzy. Still don't, but at least I have a
18 phone conversation where Mr. Henzy promised to send me a
19 letter to explain those things and why some things aren't
20 disclosed and some things don't exist, et cetera. And of
21 course, that motion, as the Court pointed out, is not ripe
22 yet.

23 Judge, the probable cause hearing, as I
24 understand it, on these aggravating factors, is in the
25 nature -- as it was described in the case, I believe -- of a

1 preliminary hearing. Well, what happens at a preliminary
2 hearing is -- my recollection, it's been a while since I've
3 done one, thank goodness -- but my recollection is officers
4 and witnesses and so forth, if they have reports, they show
5 up with their reports. They give them to the defense, they
6 give them to me, if they have one, and then we proceed with
7 the hearing. And the defense gets to cross-examine on the
8 basis of the witness's report, if they have one, and we
9 proceed in that fashion. That's what I anticipate we will be
10 doing.

11 I am putting pressure on Mr. Echols to
12 get me a report as quickly as possible. And as soon as I get
13 a report, I will disclose such a report. But that is the way
14 I understand that kind of a hearing to be.

15 And similarly with Mr. Englert and also
16 the lighting expert -- and I can't remember if his name is --
17 I think it's Kiviyat. It's a peculiar name that I have
18 trouble remembering. In any event, I don't have a report
19 from either of them yet either, although I have asked for a
20 report from Mr. Englert.

21 And I hadn't noted, until Mr. Sears
22 brought it up, that I had not yet received a report from
23 Mr. Kiviyat. I am not sure yet if he is going to give me a
24 report. I'll have to find out about that.

25 So is this undisclosed evidence? Yes,

1 it's expert witness analysis undisclosed evidence, which the
2 Court exempted from that ruling, which we will promptly
3 provide to the defense, just as we have promptly provided as
4 much disclosure at every step along the way, right up until
5 today's date, when Mr. Sears asked me to get out of evidence
6 these books that Mr. DeMocker had ordered and bring them with
7 me.

8 And I said, "Well, you know, nobody from
9 the sheriff's office is coming." And I said, "Can you have
10 somebody from your office get them?" And Mr. Sechez was kind
11 enough to go down and check them out of evidence and bring
12 them for Mr. Sears today.

13 And I thank you, again, Mr. Sears, for
14 giving us that CD.

15 In terms of never heard back from
16 Mr. Butner about being late with the motion, I don't know,
17 maybe Mr. Sears doesn't read his e-mails.

18 But I sent you an e-mail, and it said we
19 have been experiencing delays -- not that you haven't heard
20 me say that before. Right, Mr. Sears?

21 So I responded by e-mail either that very
22 same day that I filed the motion response, or the following
23 morning. I can't remember. I didn't think it would be an
24 issue.

25 In terms of courtesy, until this moment

1 in time, things have been moving along rather courteously. I
2 am not so sure it's going to be that way henceforth. I
3 certainly hope so.

4 THE COURT: Let's try and keep it that way.

5 My preference would be if you would
6 address your comments to the Court rather than to Mr. Sears.

7 MR. BUTNER: Yes, Your Honor. I understand.

8 I apologize to the Court for filing a
9 response late. The error is mine. It just didn't get
10 calendared. I promptly responded when Mr. Sears brought it
11 to my attention, and I appreciate him doing that, too, quite
12 frankly.

13 This indefinite delay, yeah, it is
14 stunning all right, but it isn't, certainly, a delay that has
15 been occasioned by foot-dragging on the part of the State.
16 In fact, we are doing everything we can to get these things
17 accomplished in an expeditious fashion. We have spent two
18 full days looking at evidence.

19 I was there -- I would say probably the
20 majority of the time, barely, because I had other things to
21 do and could not devote all of my time to them. But we got a
22 lot done. We still have a lot more to do, and we are working
23 toward getting those things done.

24 I was in hopes that I would be able to do
25 interviews this week, Judge, and I was scheduled to be in

1 trial the last three days of this week. That defendant is
2 going to plead guilty tomorrow morning and has signed a plea
3 agreement. So I suddenly have got those three days available
4 for interviews, and, of course, we will try and do that.

5 Judge, all I can say is that we are doing
6 the best that we can in terms of disclosure of expert witness
7 opinions. We have already disclosed their identities. And I
8 think I probably said enough now.

9 THE COURT: Well, again, if there is a need
10 for an additional hearing -- I recognize that I have already
11 had a Simpson hearing. I received a bunch of evidence on the
12 case. I have had a lengthy amount of hearings that provided
13 me with information about the case.

14 I guess what I need to know is if you
15 need to present something additional -- it seems to me that
16 the financial review only has to deal with one potential
17 aggravating factor and not the others. And so I guess the
18 question I have is, how much more time do we need? Do I need
19 to schedule that before the November set of hearings that I
20 have already reserved four days in November?

21 MR. BUTNER: Judge, I do think that we need a
22 couple of hours in a hearing of that nature. I do think that
23 Mr. Echols is going to shed considerable light. He has kind
24 of previewed what he can provide for the State in terms of
25 its case, and I think that that's going to be very important

1 evidence, and I think it is also something that the defense
2 is going to want to have. And so I think that that will be
3 important.

4 I think that probably -- in going through
5 the transcript of the Simpson hearing and going through the
6 Court's ruling, I think that there are other matters that
7 also need to be addressed. I would ask that the Court leave
8 it open on all of the aggravators to receive additional
9 evidence, but I don't anticipate that there will be a great
10 deal of evidence in regard to any of the other aggravators,
11 other than the one concerning pecuniary gain. And then also
12 the aggravator concerning prevention of reporting something
13 to law enforcement. That type of thing.

14 THE COURT: You weren't here. I think the
15 case wasn't assigned to you, I believe, when I had all of the
16 evidentiary hearing --

17 MR. BUTNER: That's right.

18 THE COURT: -- but you are reviewing --

19 MR. BUTNER: I am looking at transcripts.

20 THE COURT: Thank you.

21 Mr. Sears.

22 MR. SEARS: I feel very much in the position
23 that I was in when I first stood up here, Your Honor. I
24 can't tell from Mr. Butner's remarks whether the State is
25 thinking that because it's their burden that they are going

1 to offer more evidence, and I certainly can't tell from his
2 comments whether he thinks he would be permitted to present
3 evidence that we have not seen.

4 This unspecified delayed evidence from
5 Mr. Echols -- or any evidence from Mr. Echols, frankly. We
6 have not seen a word from him. And it's not -- we are not in
7 the same posture as a preliminary hearing in the beginning of
8 the case. We are 15 months downstream from the death of
9 Carol Kennedy. 15 months. We are 11 months --

10 THE COURT: Granting, of course, that the
11 Steinle case didn't exist at that time.

12 MR. SEARS: That is true. But we are also
13 nearly a year downstream from the noticing of these
14 aggravators in the death penalty notice in this case.

15 And as I said in my reply, Your Honor, we
16 believe that it is ethically incumbent upon any prosecutor --
17 not just Mr. Butner -- any prosecutor to know that they have
18 at least probable cause when they allege the aggravator, and
19 it is certainly the law after Chronis v Steinle that that is
20 so, in this case.

21 And Mr. Butner says, in his pleading,
22 essentially, that at least with respect to two of these
23 aggravators, the pecuniary gain and the witness killing
24 aggravator, that they don't have that evidence, that they
25 need this additional, unspecified evidence from Mr. Echols

1 before they are ready to go forth. To us, that sounds like
2 the State concedes that those aggravators were noticed
3 without probable cause.

4 And to the extent that the State wants to
5 bring in other evidence without some clear ruling from this
6 Court about what the State may or may not offer, we are going
7 to be put in an impossible position. In a preliminary
8 hearing at the beginning of the case, everyone understands
9 that that is usually the first time that the defendant sees
10 or hears any of the evidence against him. But this is not
11 that sort of a case. This is many, many, many months down
12 the road.

13 THE COURT: No, I think that the Steinle
14 case -- the Chronis case made an analogy to a preliminary
15 hearing. As I read it, it's not saying that the same rules
16 govern the determination, but rather, simply that a defendant
17 has a right to a determination of whether there is probable
18 cause to support the allegations made for purposes of the
19 death penalty.

20 MR. SEARS: Our view, and the view that I
21 think is becoming shared by people whose cases are further
22 along in the process than this one, is that the hearing is
23 conducted under Rule 5, not under Rule 12. And it
24 contemplates full participation by the defendant,
25 cross-examination of the State's witnesses. It's an

1 evidentiary hearing. It's not simply a one-sided grand jury
2 presentation or even the sort of summary presentation that is
3 allowed in preliminary hearings. I do recall the part
4 analogizing it to a preliminary hearing in terms of how it
5 could be conducted.

6 But our concern is this: Mr. Butner, as
7 far as we can hear today, his best explanation for being late
8 is "I overlooked it," and more troublingly, "We are just
9 doing the best we can." And I am here to say that I don't
10 think that's good enough, Your Honor.

11 The suggestion has been made by
12 Mr. Butner here directly that we are responsible, that
13 somehow we are in cahoots with Tom Henzy, and Mike Terribile,
14 and Chris Kottke, and other unnamed co-conspirators to
15 stonewall and delay the case. I would defy the prosecution
16 to show where we have actually done anything but try to move
17 this case along.

18 We are the ones that suggest dates and
19 times for evidence reviews. We are the ones that provide
20 names of witnesses to be interviewed. We are the ones that
21 file motions like this motion to dismiss, to narrow the
22 issues sooner rather than later.

23 This is a remarkable case, because it is
24 a case in which the only people out there saying go slow,
25 hold on a second, delay, are on that side of this courtroom.

1 The defendant in this case wants this case to move forward.

2 We picked that date because we thought it
3 was reasonable with the Court's permission and the Court's
4 calendar. We think it is reasonable, but only if -- and only
5 the "if" is if the State plays by the rules. And the rules
6 begin with Rule 1.3 and Rule 35.1: Respond to important
7 motions on time, and if you can't, don't wait until you hear
8 from the other side to say you are sorry.

9 This is not a criminal trespass case.
10 This is a capital murder case, Your Honor. It couldn't be
11 more important, the stakes couldn't be higher, and our client
12 sits in jail while this is pending.

13 THE COURT: Nor would I suggest it is
14 something that requires, at this Chronis hearing, a
15 determination beyond a reasonable doubt. It is a probable
16 cause determination.

17 MR. SEARS: I understand. I understand, Your
18 Honor.

19 But it's new probable cause, and it may
20 not be subject to a decision by this Court simply on the
21 state of the record in this case.

22 However, if the Court were to grant our
23 request for sanctions and apply Rule 35.1 as written, which
24 says an unresponded to motion is deemed submitted on the
25 record, that is what I think the rules contemplate in this

1 case. And had Mr. Butner asked for more time, had Mr. Butner
2 filed a motion to a large -- had Mr. Butner done anything
3 that counsel would ordinarily be expected to do if they knew
4 they were going to be late on a response to a motion like
5 this one, Your Honor, then I would have a different position
6 about how this should be handled, but I don't think so.

7 THE COURT: Couldn't he have simply not
8 responded at all and relied on your disjunctive, though, in
9 terms of your asking in the disjunctive for an evidentiary
10 hearing to be conducted?

11 MR. SEARS: Well, I think if you read our
12 motion as a motion to dismiss, and if the Court is not
13 prepared to dismiss, then and only then a request for a
14 Chronis hearing. It's not truly --

15 THE COURT: I am not prepared to dismiss. I
16 will say that.

17 But I read your motion, and I believe
18 that it specifies the disjunctive of authorizing, under the
19 Chronis decision, an evidentiary hearing.

20 I don't want to revisit all of the
21 evidence that's already been conducted. I would like both
22 sides to acknowledge that I have received evidence already,
23 and since the decision is directed to me for my decision,
24 frankly, if you wanted to refresh me in terms of my
25 recollection about particulars of the evidence or give me

1 portions of transcripts that pertain to the things that you
2 want me to recognize in terms of what the evidence has done,
3 to the extent that you haven't already -- and I recognize
4 that you have in some of the comments you made on specific
5 allegations for death penalty purposes -- I can do that. If
6 something further is in need of development because the
7 Simpson issues were addressed to something different than
8 what this Chronis motion is directed to, I am willing to give
9 time for doing that.

10 But I think the State conceivably could
11 have simply not responded at all and relied -- and come here
12 and sought the evidentiary hearing that was being requested
13 as an alternative to the dismissal.

14 So I would like to go ahead and set a
15 hearing. You have told me before that you would prefer not
16 to impinge upon the November hearing time frame that I have
17 set for other motions. So I would like to go ahead and set
18 an appropriate amount of time that would provide for a
19 hearing to bring out any other information in support of
20 probable cause or lack of probable cause, as the case may be,
21 for whatever the death penalty allegations, for any
22 individual. One of them is appropriate.

23 MR. SEARS: I understand --

24 THE COURT: I'll reaffirm the previous orders
25 that I entered with regard to discovery and disclosure,

1 however. So I will note that at this time.

2 MR. SEARS: Do I take that, then, Your Honor,
3 to indicate that the Court would not permit the State at this
4 hearing to introduce undisclosed or late disclosed
5 information without -- we just want to be sure we are
6 prepared when we walk in here that day.

7 THE COURT: I would like to have the State
8 disclose -- if they are going to do it -- in sufficient time
9 in advance of the hearing for you to be able to respond to
10 it. If the expert -- any one of the experts listed get their
11 reports out to you in the next week or so, then I think you
12 will have sufficient time to be able to subpoena any
13 additional witnesses that you may need to counter that
14 information.

15 It is a probable cause determination. I
16 don't see that there need be some additional discovery. I
17 tend to agree with your observation about the requirements of
18 having probable cause at the time you make the allegations
19 for purposes of invoking the death penalty.

20 So that is a long way, I guess, around
21 saying yes, but I would countenance receiving information at
22 that point in time, but I think I am going to have to do some
23 kind of cutoff in advance of the hearing that may be at least
24 two weeks, if not three, in advance of the hearing. The
25 information that they are going to rely on for purposes of

1 that hearing needs to be disclosed.

2 MR. SEARS: When are you thinking about
3 setting this, Your Honor?

4 THE COURT: Tuesday, October 20th, if you are
5 available.

6 MR. SEARS: Sure. Everyone is scrambling for
7 their BlackBerry, but I know I will be here, Your Honor.

8 THE COURT: And I have two hours in the
9 morning on Tuesday, October 20th, from 10:00 till noon. If
10 that is not sufficient for both sides to bring out whatever
11 you need to, beyond what I've already heard in the Simpson
12 hearing, I can do it the following week, Tuesday, October 27.
13 And there I have essentially two hours in the morning and
14 currently don't have anything set in the afternoon.

15 MR. SEARS: Let's see what the oracles tell
16 us, Your Honor.

17 THE COURT: Go ahead.

18 MR. BUTNER: Tuesday, October the 20th, works
19 for me, Judge.

20 THE COURT: Do you think two hours is going to
21 be enough?

22 MR. BUTNER: I believe so.

23 THE COURT: That would be in keeping, also,
24 with setting the monthly review, as far as status of the case
25 and whether further witness interviews have been done and

1 those sorts of things. So it would keep our monthly time
2 frame that we have been keeping anyway, going into October.

3 MR. SEARS: We will have a quorum on our side
4 for both of those days, Your Honor.

5 THE COURT: Okay. Let me set you for
6 ten o'clock, then, on Tuesday, October 20th, for the next
7 meeting in regards to that issue. And that is any additional
8 evidence and oral argument concerning what has or has not
9 been proven by probable cause or aggravating factors. A
10 Chronis hearing.

11 So Chronis hearing, two hours, including
12 hopefully, within that time we will also be able to handle
13 the pretrial and see how things stands.

14 MR. SEARS: Two hours on each of those days?

15 THE COURT: I was only scheduling two hours
16 because that is how much Mr. Butner suggested I would need.

17 MR. SEARS: I think we probably need as much
18 time as Mr. Butner says he is going to take.

19 THE COURT: I don't have that much time on the
20 20th. I could, as I say, give you another couple of hours on
21 the 27th.

22 MR. SEARS: If we could reserve both days.

23 Thank you.

24 THE COURT: 27th for two hours, ten o'clock to
25 noon on the 27th of October is also ordered.

1 MR. BUTNER: Judge, I don't have time that
2 day. I have another trial set to go on October 27 in
3 Pro Tem B.

4 THE COURT: Judge Darrow?

5 MR. BUTNER: Yes. Six-day trial.

6 THE COURT: I have -- well, I am not able to
7 put anything else on that day, and I am up against -- I am
8 currently in trial on another couple of cases that week,
9 also.

10 Any chance you can dish that case off to
11 somebody?

12 MR. BUTNER: I wish I could, Judge. No, there
13 really isn't.

14 THE COURT: Is that a four-day trial?

15 MR. BUTNER: It's a six-day trial.

16 THE COURT: Does it resume on Tuesday,
17 November 3rd?

18 MR. BUTNER: Yes. November 3rd and
19 November 4th.

20 THE COURT: Any chance, with this amount of
21 notice, that Judge Darrow could move that to the last two
22 days of the week instead of the --

23 MR. BUTNER: I don't know about that. I
24 really don't.

25 THE COURT: So that I could use --

1 Mr. Sears, any thoughts?

2 MR. SEARS: Your Honor, we are just anxious to
3 get this heard. We want the Court and Mr. Butner to know
4 that should the Court not dismiss the death penalty
5 allegation in this case, we have many other motions that we
6 would bring immediately, going after other aspects of the
7 propriety or the lack of propriety of the death penalty in
8 this case that we will want to have heard, perhaps in those
9 November hearings, when the Court said it wanted to hear
10 those kinds of issues.

11 We have been trying -- we tried -- that's
12 why we filed this motion in August trying to narrow the
13 issues in this case, to detest mightily whether or not this
14 is a capital prosecution, which is our position in this case.

15 I understand everyone's schedule, but
16 whatever the Court can do to find time, and Mr. Butner can do
17 to find time, we think is terribly important. We can't think
18 of anything that would be more important on anybody's
19 calendar than this issue in this case.

20 THE COURT: Well, you tell that to the other
21 defendants that have equal due process rights.

22 MR. SEARS: I try. I try.

23 THE COURT: I hear what you are saying.

24 Well, at this point, I will set you for
25 two hours on the 20th. I will see what I can do and talk to

1 Judge Darrow about the possibilities of having, perhaps, a
2 Wednesday-Thursday schedule that week for Mr. Butner. If he
3 can accommodate me to finish the hearing within two weeks on
4 November, that would be the 3rd --

5 MR. SEARS: Here's a suggestion, then, Your
6 Honor. If we are going to start on the 20th, October 1st is
7 less than three weeks prior to that. I would ask the Court
8 to consider cutting off all disclosure and any evidence that
9 the State would want to offer at the 20th hearing and the
10 resume hearing after the 20th, at the end of the day on
11 September 30th.

12 THE COURT: Mr. Butner?

13 MR. BUTNER: Judge, it is one thing to cut off
14 discovery. It is another thing to cut off analysis by
15 expert.

16 We have got just a huge amount of
17 computer information, and in fact, stuff that they haven't
18 even been able to get into. So I don't think that that is --
19 I don't think that is fair, and I don't think that is
20 appropriate. Like I said, we have a guy living in Phoenix
21 doing this now.

22 And I think it makes sense to cut off
23 disclosure. That is fine. We've got it all copied and
24 provided to the defense. But to stop the analysis of
25 evidence, that is ridiculous.

1 THE COURT: I don't think that is what
2 Mr. Sears is saying. I think he is saying for purposes of
3 the hearing that I cut off your use of any of that
4 information that is disclosed after October 1st or after
5 September 30th, is what he is asking for.

6 MR. BUTNER: Well, I would ask, then in that
7 regard, that it be that you give us two weeks prior to the
8 date of the hearing. And the hearing is on -- starts on
9 October 20th. So then that would be the 6th.

10 THE COURT: Mr. Sears, anything else you
11 wanted to say?

12 MR. SEARS: The State has had a year since the
13 case was filed, when you run out to October 20th. They have
14 had 15 months now, soon to be 16 months.

15 THE COURT: I will pick Judge Hinson's
16 retirement day. You have until the 2nd of October. That is
17 the end of next week.

18 MR. BUTNER: Thanks, Judge.

19 MR. SEARS: Thank you.

20 THE COURT: The next motion I think you had,
21 Mr. Sears, was pertaining to release.

22 MR. SEARS: I do. Your Honor, thank you.

23 We are extremely grateful for the Court's
24 earlier ruling following the Simpson hearing, determining
25 Mr. DeMocker was subject to bond in this case. And we

1 appreciate the Court's patience in hearing us in our first
2 motion to modify the amount of the bond initially set.

3 I want to say a couple of things. We
4 have prepared a presentation for you that is part of our
5 overall presentation today, that we are not sure, of course,
6 what the Court's thinking was when the Court declined to
7 reduce the bond from the \$2.5 million arrangement we
8 originally asked you for.

9 We think things have changed on the
10 ground, and we have a new proposal and a different proposal
11 to make to you today that we hope will address what we think
12 may be one of your concerns, which is the question of whether
13 Mr. DeMocker truly intended to run away before he was
14 arrested and whether he poses a flight risk if he were
15 released from jail in this case. There are a couple of
16 general points I want to make about what I think has happened
17 in this case.

18 One of the factors that the statute and
19 the rule I'd tell the Court to look at is the relevant
20 strength of the State's case. And without repeating what I
21 said here earlier this afternoon, our view remains that the
22 State's case has gotten absolutely no stronger with the
23 passage of time from the last time we were before you, and we
24 think that is significant. And it's not for lack of trying.

25 We now know that in the interim

1 Mr. Butner has taken over this case and has identified
2 additional experts. Nothing has been presented. No new
3 facts have been presented that would tie Mr. DeMocker to this
4 terrible crime. No direct physical evidence was present when
5 Doug Brown signed search warrant affidavits a year ago. No
6 new physical evidence has come to light in the interview.

7 The case against Mr. DeMocker is entirely
8 circumstantial. And as the State now concedes in its
9 response, basically it's limited to the fact they he had the
10 opportunity, in the time frame that this murder took place,
11 to commit it because he was out in the woods and didn't have
12 anybody see him out there to corroborate his alibi in this
13 case. I simply point that out because I think it's a factor
14 in this case.

15 The Court previously ruled that the
16 evidence that the State had presented in the Simpson hearing
17 didn't rise to the level of proof evident, presumption great.
18 And I wouldn't think that if we had another Simpson hearing
19 today, the Court's ruling would change any. The evidence is
20 no stronger and, in fact, the further we go down the road and
21 the closer we get to trial, the more striking I think that
22 becomes.

23 The next factor that I want to talk about
24 is the position of the victim in this case. The only time
25 we've ever heard from anybody officially as a victim in this

1 case was at the hastily arranged initial appearance before
2 Judge Markham immediately after Mr. DeMocker was arrested
3 last October, and Victim Services reported that Ruth Kennedy,
4 who was the mother, obviously, of Carol Kennedy, wanted
5 Mr. DeMocker held without bond in that case.

6 I am here to tell you that there are
7 other victims in this case, Your Honor, the DeMocker
8 children, Katie and Charlott. And I am sorry that their
9 independent counsel has not been retained to be here to
10 address you directly.

11 But I can tell you this -- and I don't
12 think it's anything sinister or improper -- but I can tell
13 you that I talk regularly with both Charlott and Katie.
14 Charlott is here in court. Katie is in New York on a school
15 project with the United Nations.

16 But I can tell you and they would tell
17 you, if you needed to hear it directly from them, that their
18 strongest wish in the world is to have their father home.
19 They believe absolutely in his innocence in this case. They
20 know that he's innocent.

21 And over the last year, Your Honor,
22 Charlott, in her last year at home -- she is a senior at the
23 high school -- has had to go through Thanksgiving, Christmas,
24 Mother's Day, Father's Day, the anniversary of her mother's
25 death, the beginning of her senior year in high school,

1 without her father. She has not been able to touch her
2 father, now, for 11 months in this case.

3 If there was strong evidence in this case
4 that Mr. DeMocker was guilty, if there was a videotaped
5 confession, if there was physical evidence that put him at
6 the scene of the crime, if Carol Kennedy's blood was found on
7 him, then maybe we would have a different situation. Maybe
8 we could feel differently about whether Mr. DeMocker should
9 be out of custody, pending this case. But that's not so. We
10 don't have that evidence in this case, and the Court is aware
11 of that.

12 Charlott and Katie have been without
13 their father. They have lost everything. They've lost their
14 home. They lost their next home. They lost their mother.
15 There is a possibility they could lose their father forever
16 in this case. There is a possibility their father could be
17 put to death in front of them in this case.

18 And despite of all of that, they speak
19 with one voice, and the one voice says that they want their
20 father home, and they want their father home as soon as the
21 Court can see its way to let that happen in this case.

22 Here is what we have to offer today.
23 It's a three-part program. We are proposing that
24 Mr. DeMocker be released on a greatly reduced bond. We had
25 previously talked about \$250,000.

1 The DeMocker family is here -- as many of
2 them as could be here for today's hearing. And their
3 financial position has not changed for the better since we
4 were here before. If anything, it has changed for the worse,
5 because over time they have had to contribute more money for
6 the support of the DeMocker children and the DeMocker family.

7 I've marked as an exhibit, Your Honor, a
8 statement that Dr. and Mrs. DeMocker -- Steve's parents have
9 prepared for the Court here. I provided a copy to
10 Mr. Butner. I offer this in this hearing, which is not an
11 evidentiary hearing, in lieu of their personal testimony,
12 because time is short.

13 But in the statement, Your Honor, you can
14 see they express their love and their belief in their son's
15 innocence and repeat what I've just said about the effect
16 that this has had on both the Kennedy and the DeMocker
17 families, and particularly on Charlott and Katie DeMocker in
18 this case. They would be involved in this, because if the
19 Court were to adopt our proposal, the DeMocker family --
20 primarily Dr. and Mrs. DeMocker, but also Steve's brothers
21 and sisters would have to shoulder the burden of raising the
22 premium and the collateral for this bond.

23 And that is important, because Steve
24 knows his family and knows the love and support of his family
25 that is there. It is unthinkable of Steve to put any of them

1 in jeopardy. And the loss of the bond collateral would be
2 devastating to the family members that post it in this case.

3 And with the weakness of the evidence
4 against him, the incentive for Steve to run away and avoid
5 prosecution in this case and leave and abandon his daughters,
6 who have supported him completely, and devastate his family
7 in a financial way is unthinkable and unimaginable to Steve
8 and, I would hope, to the Court in this case.

9 The second part of this proposal is the
10 use of the Pretrial Services Division, the Adult Probation
11 Department, but only in conjunction with what I am about to
12 show you, which is a very sophisticated, high-tech, GPS-based
13 electronic monitoring system. I talked in general terms
14 about electronic monitoring, now knowing very much about it
15 when we were here before. I know a great deal more about it,
16 and with the Court's permission, we would like to show you a
17 little demonstration of the program that we would put in
18 place.

19 But here is how it would work, Your
20 Honor. The idea would be that the Court would determine the
21 boundaries of an electronic fence that would be placed around
22 Mr. DeMocker. And the way that works is using technology
23 software and hardware provided by a company called Pro Tech,
24 who already provides the same equipment and services to
25 Yavapai County for the supervision of adult sex offenders.

1 Another company called GSSC, in
2 Minneapolis, has put together a program that provides active
3 monitoring. And I came to understand -- and stop me, Your
4 Honor, if you know all of what I am about to say. But the
5 difference, generally, between active and passive monitoring
6 is pretty stark.

7 Passive monitoring is what I had in mind
8 when I was before you the last time and what the probation
9 department uses. And there is a certain sense that it is on
10 the honor system. There is an electronic monitoring device
11 on the ankle of the individual, and once a day that
12 individual is required to take that monitoring device and put
13 it into a dock, and it downloads information showing where
14 that person has been. And then the probation department or
15 whomever is supervising that person can look and see if that
16 person has followed the rules -- stayed away from playgrounds
17 and schools and places where children gather. It really
18 doesn't do a great deal to guarantee that that person is
19 where they are supposed to be in real time.

20 By contrast, active monitoring works very
21 differently. It uses cell phone technology. And the device
22 transmits, every minute, a cell phone signal with GPS
23 coordinates to a series of computers.

24 GSSC has a program where -- and we'll
25 show it to you. We'll show you how it works -- where you can

1 track virtually in real time the exact location and movements
2 of that individual.

3 In addition, the device itself sends out
4 what are called "alerts," and the alerts can be set up by the
5 Court's order, with the help of this company, to require
6 Mr. DeMocker to be in a particular place. It can be as
7 restricted as his home. It can be as large as the Court
8 wants to make it.

9 We are going to show you a demonstration
10 where we just arbitrarily created this electronic fence --
11 it's called an "inclusion area" -- that covers where
12 Mr. DeMocker would propose to reside, out White Spar Road --
13 in the downtown area, including this building, my office, my
14 new office on Gurley Street, the probation department, and
15 areas in between.

16 You can also create "exclusion zones."
17 And for purposes of this demonstration, we chose the airport,
18 for obvious reasons, and the residence at Bridle Path.

19 And what happens is if the individual
20 goes out of the boundaries of the inclusion zone or enters
21 into the boundary of the exclusion zone, it sounds out an
22 alert. And the alerts are sent -- there are four possible
23 options: e-mail, a text message to a telephone, a fax, or a
24 page. And you can send out any combination of those to
25 essentially as many people as the Court identifies.

1 So we had in mind using the Pretrial
2 Services Department, who have round-the-clock surveillance
3 officers, as the first line of receipt, but it could be
4 anybody. It could be Mr. Butner's cell phone. It could be
5 Detective McDormett's cell phone. It could be one of the
6 investigators. They can have faxes and e-mails and text
7 messages and request for pages sent to as many people as they
8 want, including the Court -- including anyone that the Court
9 thinks should be aware of this -- the dispatch number of the
10 sheriff's department, the dispatch number of the Prescott
11 Police Department with instructions.

12 In addition, we would propose that
13 Mr. DeMocker report every day to the Pretrial Services
14 Department. If the Court allows him the ability to go some
15 distance away from his proposed residence, he could report in
16 person every single day.

17 In addition, the Court knows that they do
18 random unannounced surveillance at the location of where he
19 is supposed to be, and he could have a curfew. There is
20 really no limit to the rules that we could impose on
21 Mr. DeMocker. Mr. DeMocker is certainly, without question,
22 willing to and ready to accept any rules that the Court
23 imposes, including absolute house arrest.

24 The system is so sophisticated, Your
25 Honor, that you can have a schedule -- you can say

1 Mr. DeMocker shall be at his residence and no place else, but
2 every Tuesday at two o'clock he is permitted to go from
3 two o'clock to three o'clock to my office or for scheduled
4 court appearances, to come here. And then that would change
5 the boundaries of this inclusion zone, but not on a permanent
6 basis -- just on a scheduled basis.

7 In addition, the customization
8 possibilities are pretty much endless. We will show you --
9 we picked randomly, in a regularly shaped area, just to show
10 you for demonstration purposes, that the Court can be as
11 creative as it chooses to be in deciding where he can go.

12 So you have the combination of a bond,
13 the forfeiture of which would be a horrible thing for Steve
14 to imagine, Pretrial Services's regular scrutiny, and this
15 GPS monitoring. That is what we are proposing in this case.

16 Before I do the demonstration, I have one
17 other thing that I want to bring to the Court's attention.
18 During our evidence review, we finally got to put our hands
19 on these books. Much as been said about these books, to two
20 grand juries and to this Court, as evidence that Mr. DeMocker
21 intended to flee. We've looked at them.

22 They are actually junk, Your Honor. I
23 don't know any other way to put them. They are cheaply
24 written. They suggest things like dressing as a hobo or
25 hiding in abandoned farm buildings. They are really not

1 something that is serious.

2 And when she was interviewed by the
3 police, Ms. Gerard -- Mr. DeMocker's girlfriend -- said she
4 thought this whole thing was a joke -- this whole thing being
5 the idea of running away.

6 These books are not dog-eared, they are
7 not written in. There is no evidence whatsoever that
8 Mr. DeMocker did one thing that any of the books suggest,
9 because they are ridiculous ideas. And Mr. DeMocker
10 immediately knew that -- as he told the police when he was
11 arrested on October 23rd -- that it was stupid and
12 fear-based.

13 What was he afraid of? He was afraid of
14 being arrested without probable cause for a crime he didn't
15 commit. That's what he was afraid of. But where was he
16 arrested? Sitting at his desk, in his office, where they
17 knew he would be.

18 Mr. DeMocker talked to the police when he
19 was arrested. Mr. DeMocker talked to the police for hours
20 the night of Carol Kennedy's murder in this case.
21 Mr. DeMocker has cooperated in other ways.

22 We have received anonymous information.
23 We turned it over to the County Attorney's Office. Without
24 going into any details on the record, Mr. DeMocker has
25 provided what we think is an amazing level of cooperation in

1 this case, because we are interested in finding out who did
2 this. We are interested in finding the real killer in this
3 case, Judge.

4 But I wanted the Court not to be afraid
5 of these books. I wanted the Court -- and to the extent that
6 Mr. Butner is willing to do it -- leave them here for the
7 Court to look at. They are laughable, at best. Under other
8 circumstances, a refund probably would have been in order in
9 this case.

10 So with the Court's permission, if we
11 could do a brief demonstration with this GPS unit, we've got
12 it set up here.

13 THE COURT: I will comment that I am aware of
14 the sex offender monitoring. I have had presentations by the
15 probation office with regard to passive and active, but I am
16 willing to listen and see how this compares to what their
17 program is.

18 MR. SEARS: Thank you. Let me tell you what
19 we did. Mr. Robertson, our investigator, has been sort of
20 the point person on this, and has obtained -- we actually
21 have -- this is the device. This is the transmitter here.
22 It has a strap. The strap actually has electronics in it so
23 that tampering with the strap or cutting the strap sends an
24 alert signal. The alert signal -- it flashes green and red.
25 And then -- so this obviously goes on the ankle.

1 But what we have done over the last
2 couple of days is experiment with it. And on our own, with
3 the assistance of GSSC in Minneapolis, we have done some
4 experiments. And what we are going to show you are the
5 visual representations that anyone looking at this would be
6 able to see.

7 But for purposes of rather than doing a
8 live demonstration and wasting a half an hour driving around
9 town, we did this yesterday and today, so that we can show it
10 to you now. And we have done some things on purpose: We
11 have forced some zone alerts; we have driven out the pre-set
12 zone; we have taken the strap off to create a strap alert.

13 And then we can show you, on our cell
14 phones, the alerts that were sent. We set it up to send text
15 messages, for example, to Mr. Robertson's phone and my phone.
16 And we can show you how that works, and we can actually show
17 you the message.

18 And this is a -- simply a demonstration
19 of how this works, and we can also show you the computer
20 screens. And the way this works, also, is anybody that is
21 given permission within the list of people, can go online at
22 any time and log in and open up these screens and watch
23 Mr. DeMocker. See where he is.

24 And it has GPS coordinates, and it
25 shows -- there is a running clock that shows where he is at

1 any given moment -- any movements like that. And then every
2 day, a report is e-mailed to whomever asks for it, showing
3 all of his activity for the day and any error alerts that
4 were reported during the day.

5 So it is a pretty powerful presentation.
6 It will take us a few minutes to show it to you, but if the
7 Court would bear with us, I think it would be important for
8 the record in this case. Thanks.

9 MR. ROBERTSON: Thank you, Your Honor.

10 This is the device that Mr. Sears was
11 saying. And inside this device is both cellular and GPS
12 technology. Unlike the passive system that you are aware of
13 through the sex offender program, this device actually sends
14 a signal directly to cell phone towers, which transmits to
15 the computer systems in Minneapolis, that can be viewed by
16 anybody that has the software that Mr. Sears mentioned.

17 In a passive system that you are familiar
18 with, this transmits -- this is on the ankle. This transmits
19 to a device that the offender wears on a belt. And then that
20 device goes into a charging unit that is connected to a phone
21 line, and that transmits. That is not in real time. So it's
22 only like once a day that somebody would know what the
23 device -- where the device has been.

24 This device would go full time. I hope
25 this hasn't shut off while we have been waiting. But the

1 mapping program that comes with this is accessible through
2 any kind of a Windows-based software, and we are using just a
3 wireless setup through the court -- and of course it logged
4 out while we were standing here.

5 Essentially, this is what -- looks like
6 we have the signal. This is the kind of map that would show
7 up when somebody gets monitored when the system is brought
8 in. This shows the Prescott area, generally. We are
9 approximately there. And this can be zoomed in or to the
10 street levels. Right now you can see we are looking at it
11 from a 22-and-a-half-mile range.

12 And we created just arbitrarily, as
13 Mr. Sears said, an irregularly shaped inclusion zone, just to
14 show you that it is possible to create any type of area that
15 the Court may wish to include. And this can be as small as a
16 home, or it can be as large as an entire state.

17 So we have just created the kind of
18 populated area of downtown Prescott. On the east, out at
19 shopping mall area, and on the north, just up in this area,
20 just short of the outer loop, and then down in here is where
21 Mr. DeMocker would be proposing to stay. Let me show you
22 what happens.

23 We had this -- I just carried this around
24 yesterday in my vehicle -- this would be strapped on
25 somebody's ankle -- and I drove it to see what would happen.

1 And this records from 5:00 p.m. to 9:30 p.m., roughly. And I
2 want to show you everywhere that we drove.

3 What happens is it just starts
4 transmitting this information. It goes into storage. And
5 this would be seen in virtually real time, if somebody was
6 watching it.

7 And you can see these green arrows turn
8 red as soon as they got to the end. This is when it
9 transmitted an alert saying this person has left the
10 exclusion zone.

11 The reason I went south -- as you know,
12 this is a fairly dense canyon and wooded area down here. I
13 wanted to see if all of these points are being recorded by
14 this device, and in fact they were.

15 Once it re-entered the inclusion zone, it
16 turned green again. The system is set up in such a way that
17 it would send an alert to whoever is monitoring this, that
18 the person has re-entered the inclusion zone.

19 This is on pause, now, so I will replay
20 it. Resumes it back into town. So I went east. As soon as
21 it left the area, I got another alert. Turned around and
22 came back. This is where Mr. Sears's offices are and the
23 court. We were there for a little while, working on another
24 matter, and then left and went north.

25 As you can see down below here, it is

1 giving the exact time of each point. I will replay it just
2 to -- actually, rewind it. All this information can be
3 recovered at any time, which is why we are doing it this way.

4 It tells you exactly what time the person
5 was at a certain location. Tells you how fast they were
6 going and where it is all heading. So all of this
7 information is stored in the computer and is transmitted in
8 nearly live time.

9 We did a couple of experiments downtown
10 by removing the strap, for example, to see what kind of an
11 alert we would get, and it's within three minutes the
12 computer was showing an alert and a text message was arriving
13 on the person's phone -- whoever was designated to do the
14 alert.

15 When this replays going to the north, we
16 show you -- we created some arbitrary exclusion zones, just
17 to show you what something like that might look. You can see
18 this is around the airport, around Love Field. We just
19 created a box that is about a quarter-of-a-mile across. This
20 would -- about a half-mile, excuse me. Anytime somebody
21 entered that area, as opposed to an inclusion zone where they
22 leave the area -- if they entered that area, it would send an
23 alert.

24 Same for Bridle Path. Just around the
25 home at Bridle Path is where we created another exclusion

1 zone.

2 So any number of zones like this can be
3 created, depending on the wishes of the Court. And again, it
4 could be of any size or any rules about the times. You can
5 modify these in lots of different ways.

6 So this creates an assurance to anybody
7 who is concerned about this, about the pretrial release, will
8 know fairly quickly where the person is at all times, and
9 whether or not they are staying within the boundaries, and
10 action could be taken.

11 We have a gentleman from the General
12 Services Security Corporation who is the active monitoring
13 specialist. He is on standby in Minneapolis on his cell
14 phone. If the Court has any questions, he is available to
15 answer any questions.

16 I can tell you that this company does
17 active monitoring within the State of Arizona for cities and
18 towns and -- mostly in the Phoenix metro area. They also
19 have about 5,000 of these units in service in California.
20 They are experiencing this kind of tracking type of service.

21 MR. SEARS: Your Honor, I have a couple of
22 other observations about this. Because of the ability to
23 draw the inclusion area, the electronic fence, as tightly as
24 the Court wants, as Mr. Robertson said, down to a particular
25 house -- this is a way to actually monitor house arrest. If

1 you superimpose this system and the 24-hour monitoring and
2 this virtually instantaneous alert system with the kind of
3 physical surveillance and reporting with Pretrial Services,
4 it is difficult to imagine a more comprehensive program to
5 assure everyone -- the Court primarily, the County Attorney
6 and the public -- that Mr. DeMocker will be precisely where
7 he has been ordered to be in this case.

8 The advantages of this, I think, are
9 unique because, first of all -- I don't know if I mentioned
10 this -- the proposal is it's \$20 dollar a day for this, and
11 the DeMocker family would pay this, so there would be
12 absolutely no cost to the system. If there were training
13 cost or set-up costs for GSSC to come and do that, we would
14 pay for that, as well.

15 But we think the Adult Probation
16 Department has experience, generally, with the Pro Tech
17 software. The interface, the way that the screens look and
18 feel is very similar. Mr. Robertson is right, there is a
19 difference, because this unit has the active monitoring
20 capability that the passive system that the County presently
21 uses doesn't have.

22 And we are not suggesting that someone
23 would be required to sit 24 hours a day staring at a computer
24 screen, seeing where Mr. DeMocker went. That is really the
25 beauty of the system, is that it is all automated.

1 The system itself generates the alerts.
2 And then whatever action is deemed appropriate, depending on
3 the nature of the violation, can be called into play by
4 whomever it is that gets these alerts, and they can do it in
5 any number of ways. It can go right to dispatch of the
6 police at the sheriff's office, it can go right to an
7 investigator, it can go right to a detective, it can go to
8 anybody. The logical people, the first responders might be
9 the Pretrial Services surveillance officers in the Adult
10 Probation Department, in this case.

11 But there is also the incentive --
12 Mr. DeMocker knows what this means. Mr. DeMocker knows that
13 if he is granted this opportunity to be free pending this
14 case, he has to be where he is and he has to comply with the
15 rules of this electronic monitoring, just as he has to comply
16 with other rules that the Court would impose. And there is a
17 great incentive for Mr. DeMocker to do just that.

18 Mr. DeMocker wants his day in court
19 mightily. He wants to be exonerated on these charges and
20 expects to be exonerated on these charges. And it would be
21 foolish for him -- beyond foolish for him to abuse or take
22 advantage of this opportunity.

23 There are a couple of other points that I
24 wanted to make. I made them in my written submission to the
25 Court. Despite the best efforts of the sheriff's department

1 and Mr. Butner to try and accommodate some of the things
2 we've asked for, it's pretty clear that a couple of things
3 are never going to happen inside the jail.

4 Mr. DeMocker's ability to have reasonable
5 access to his files and his documents, which now number more
6 than 60,000 -- whether it is by a secured computer on a
7 reasonable basis, in a private, secure place with a private,
8 secure phone, are not likely to be available, despite what
9 the State has suggested. None of what we have proposed has
10 been implemented so far, and what is happening is really
11 going in the other direction.

12 Recently, Mr. DeMocker's phone --
13 Mr. DeMocker only can call from a phone located in his dorm.
14 There is absolutely no privacy. And if he makes recorded
15 calls to his family or unmonitored calls to me, he has to
16 make them from inside his unit in the jail.

17 So there is absolutely no privacy or
18 security from the other inmates, nor is it possible for him
19 to have any sort of lengthy communications. As I said I
20 think before, about every 15 minutes the phone is cut off,
21 and he would have to re-dial.

22 And he shares a phone with 35 other
23 inmates. Actually, it's more than that. There is 15 cells,
24 three to a cell. There's 44 other inmates that use this same
25 phone. Mr. DeMocker can't use that phone.

1 The people with whom Mr. DeMocker would
2 have to work on a regular basis are scattered across the
3 country in different time zones. And the cost of having them
4 come to Mr. DeMocker, as opposed to Mr. DeMocker's ability to
5 interface with them from his home here in Prescott, subject
6 to all of these restrictions on his movement, makes much more
7 sense and is much more economical and a cost saving, in a
8 obvious way, should that be permitted in this case.

9 We appreciate the efforts that Mr. Butner
10 and the jail have made, but I think they know and we know
11 that there is no substitute for Mr. DeMocker having his own
12 time to work on his own case. He hasn't really been able to
13 do that in the 11 months that he has been in jail. He has
14 only been allowed to keep whatever paperwork he can get under
15 his bunk. And he told me a pretty disturbing story about a
16 mentally disturbed cell mate who decided it was a good day to
17 take all his papers out and throw them all over the cell.

18 And he is only allowed to have in his
19 cell what he can bring with him when he comes to court. He
20 can't leave anything behind when he comes over here. So he
21 obviously can't have hard copies of his file. It is becoming
22 increasingly difficult.

23 There is the difficulty of just
24 Mr. DeMocker being an hour away from me, and he is closer to
25 me than anybody else on the defense team. It is terribly

1 difficult.

2 And the visitation arrangements over
3 there are limited. The jail does their best with what they
4 have, but I am just one person visiting with one client, and
5 there are hundreds of people in the jail that have visitation
6 requirements, and there is precious little space in the jail
7 for that work.

8 And most of the time when I visit
9 Mr. DeMocker, I am speaking with him on a phone with a
10 partition between us. Every time I have a contact visit with
11 him, Mr. DeMocker has to be strip-searched. He has been
12 strip-searched in excess of 75 times, now, on some sort of
13 presumption that I am going to pass contraband to him. I
14 understand the jail's need for security, but it is
15 humiliating and degrading and offputting to Mr. DeMocker, to
16 the point where we have very few contact visits anymore,
17 because I don't want to have him go through that
18 unnecessarily.

19 Judge, this is a proposal that we think
20 honestly should reassure the Court that Mr. DeMocker will be
21 precisely where he is to be and no place else. If the Court
22 is concerned about Mr. DeMocker having the kind of movement
23 that we arbitrarily picked here out by Ponderosa Park and out
24 Iron Springs Road, we would have absolutely no objection to
25 the Court shrinking down the zone to whatever the Court

1 chooses, all the way down to house arrest.

2 Miss Gerard has rented a house in
3 Cathedral Pines. That is a subdivision across from the Pine
4 Top Community up on top of the hill there. That is where
5 Mr. DeMocker would live if he were released on these terms
6 and conditions, with his daughter, who is a senior in the
7 high school.

8 We think, from an efficiency point of
9 view, at least making his zone large enough for him to go
10 from there, here to my office, to my new office at Gurley and
11 Mt. Vernon, and perhaps to the Probation Department to report
12 daily would make sense. But we are not married to that idea,
13 Your Honor. We are more than willing to be flexible.

14 And we are deadly serious about this, and
15 Mr. DeMocker is serious and would tell you that there is
16 absolutely no chance that he would do anything to cause the
17 Court to have less faith in him or less trust in him. He
18 wasn't going to run away. It was never a serious idea.
19 These books underscore that. It was something that ran
20 through his mind in a time that was incredibly traumatic.

21 The mother of his children was killed in
22 a violent, bloody way. He had two daughters to deal with.
23 From the first day, he had some sense that he was being
24 looked at as a suspect. And he didn't go anywhere. He
25 stayed where he was supposed to be.

1 He cooperated with the police, and he was
2 where he was supposed to be on the day he was arrested, and
3 he talked with the police again after he was arrested, even
4 though his lawyer may have told him later that that wasn't
5 something that he needed to have done. He did it anyway,
6 because he wanted the police to understand his position in
7 this case.

8 I have -- I can answer questions, if the
9 Court has any. This system is one that can be implemented
10 pretty quickly. If the Court doesn't want to take the
11 responsibility for either designing the inclusion zone or --
12 and/or the identities of the people that would be on the
13 alert list, I would be happy to work with the State, with the
14 sheriff's office, with the adult probation to do it in the
15 best, most efficient way, and we would drop whatever we were
16 doing to undertake that project.

17 Your Honor, I am afraid I am repeating
18 myself, so I will just sit down.

19 But that is our presentation. That is
20 what we ask the Court to adopt.

21 THE COURT: Mr. Butner.

22 MR. BUTNER: Judge, let's not lose sight of
23 the fact that this defendant is someone that Yavapai County
24 grand jury has found probable cause for committing the
25 offense of burglary of Carol Kennedy's residence and then

1 committing the offense of premeditated murder of Carol
2 Kennedy. This is someone who admittedly was stupidly getting
3 ready to flee.

4 And I guess, as Mr. Sears argues, he
5 would be stupid to abuse this. What he is asking for is --
6 give me three steps. Give me three steps, Judge. Give me
7 three minutes to the door. That is what they are asking for.

8 This stuff about it's virtually real
9 time. Okay? All he has to do is drive on the Cherry Road
10 from here to the Verde, and he is out of cell phone distance.
11 I will tell you that. I think everything that practices law
12 in this county knows it.

13 Judge, we should not trust a person who
14 has been found to have probable cause to exist to have
15 committed a murder here in Yavapai County. We should not
16 trust them to be on the loose -- not with a cell phone
17 monitoring system, not with an ankle band, not with something
18 that is in virtually real time, not with something that will
19 keep him in the inclusion zone, but a pager might go off if
20 he left it. No, that doesn't make sense.

21 And you will notice that the defense has
22 basically glossed right over the attempted accommodations by
23 the State in this case. They just kind of let those go by
24 the by. Offers that at least 40 hours a week he can sit and
25 work with the computer and use all of the digitized

1 information that has been provided in this case. He can work
2 on that himself. Offers that he can have access to a secure
3 line with video to his attorney and the concession to allow a
4 third party on that line with them by the jail people so that
5 he can talk with expert witnesses from the jail, from the
6 securely monitored cell where that video takes place. That
7 is just ignored. That's no good. That's just not good
8 enough.

9 And it's not good enough that he just
10 remains in the jail like all the rest of the prisoners.
11 That's not good enough, even though it is an hour away from
12 Mr. Sears's office. That's just not quite good enough.

13 There is really no limit in this case as
14 to how far the defense is going to push this release issue,
15 and they have ignored, basically, accommodations that the
16 State has offered.

17 Judge, there is not new evidence here.
18 There is not new conditions here. What we've got is just
19 another run at getting Mr. DeMocker released, and this is a
20 defendant that has already planned on getting -- on evading
21 capture, on becoming a fugitive.

22 These books are not a joke. If they are,
23 they are the worst joke in the poorest of taste. These books
24 demonstrate how somebody can disappear. I have looked at
25 these books. There is nothing funny about these books,

1 especially in the context of this case.

2 And let's not lose sight of the fact that
3 this is a defendant who has already demonstrated that he is
4 extraordinarily manipulative. A defendant that has hidden
5 evidence by giving it to his lawyer.

6 Judge, this notion should be denied
7 summarily.

8 THE COURT: Mr. Sears, I do have some other
9 hearings at 4:30, so if you could be relatively brief.

10 MR. SEARS: Thank you, Your Honor. I will,
11 Your Honor.

12 It is an overstatement to say that
13 Mr. DeMocker was getting ready to flee. That is not what the
14 evidence that the Court has heard.

15 The second grand jury found probable
16 cause. This Court found that the evidence did not rise to
17 the level of proof evident, presumption great, and admitted
18 Mr. DeMocker to bond. And if the lottery should hit in the
19 DeMocker family and two-and-a-half-million dollars comes into
20 their possession, unless something is changed, Mr. DeMocker
21 could be released with none of these conditions on that bond.
22 That is the Court's current order in this case.

23 We are not just making another run at
24 this. We have not proposed this juxtaposition of Pretrial
25 Services and this particular kind of highly sophisticated

1 active GPS monitoring, with all of the capacity it has.
2 Mr. DeMocker would not be getting a three-minute head start
3 in this case. It makes no sense to say that the two or three
4 minutes between a zone alert and all of the different alerts
5 to all of the different people would allow Mr. DeMocker
6 somehow to disappear.

7 The unit uses both cell phone and GPS
8 technology. It's not simply a cell phone, so that if he goes
9 into a cell phone dead area, he is hidden from view.

10 You saw the demonstration where
11 Mr. Robertson and I drove down White Spar and down 89, past
12 the second Ponderosa Park exit, and heading down to Wilhoit
13 in there, in an area of essentially no cell phone service. I
14 know the area quite well. I think the Court does. And you
15 can see, the red arrows were there. He was being tracked by
16 the GPS component here.

17 The proposals -- the accommodations in
18 the jail, while they are encouraging, the video that they are
19 talking about is a video link that goes now to the public
20 defender's office. I have used it three or four times. It
21 is only available in half-hour blocks on a schedule, around
22 the public defender and all the other people that use that.
23 The software is available for a fee. I know another attorney
24 that has it.

25 The problem is, on Mr. DeMocker's end, it

1 is not secure. It's in a room off the old EDC courtroom,
2 inside the jail, and there is a door and a pane of glass.
3 And whenever I would talk to Mr. DeMocker on the unit, there
4 was a detention officer right outside the glass who was
5 standing a foot or two away. When I am there in person, I
6 can see that that room is neither soundproof nor secure, and
7 it has a glass window in it.

8 THE COURT: I am familiar with the space.

9 MR. SEARS: You know the space. Thank you,
10 Your Honor.

11 I think suggesting that simply because a
12 grand jury found probable cause, that that constitutes the
13 kind of overwhelming evidence of guilt that means
14 Mr. DeMocker should not be out, is not where we are in this
15 case. It's not consistent with the Court's prior rulings.

16 What we are proposing in combination,
17 combination of a bond that be a huge hurdle for the family
18 and a proven hurdle for the family, and the GPS monitoring at
19 the family's expense, and Pretrial Services every day
20 in-person, reporting or telephone, if the Court wants to put
21 him on house arrest -- and house arrest if the Court wants to
22 start him out or keep him on house arrest. It's so vastly
23 superior to his current conditions as to make it something we
24 think is worth the Court's consideration in this case.

25 What is the downside risk? What's the

1 downside risk? The downside risk is essentially the same as
2 anybody, even people inside the jail, that they are going to
3 appear. The jail take chances with people every day. We
4 drive people in the middle of the night in a bus across the
5 Cherry Road. There are things that could happen.

6 Does the Court believe that Mr. DeMocker
7 would intentionally, as Mr. Butner said, in some manipulative
8 way take advantage of the system to leave behind his
9 children, leave behind his family, and run away from these
10 charges and this evidence? That is what the Court, I think,
11 has to decide.

12 I think that everything that the Court
13 should know about those factors would move the Court towards
14 the idea that with all of these safeguards in place,
15 Mr. DeMocker could be released in this case. It is the best
16 option that we can think of to try to find
17 two-and-a-half-million dollars and bond him out with no
18 restrictions. This seems to us to be the kind of a program
19 that should raise the Court's comfort level and should cause
20 the Court to be sure that Mr. DeMocker is being watched and
21 being monitored.

22 And he has every reason in the world --
23 whether Mr. Butner believes it or not -- he has every reason
24 in the world to be compliant to these terms and conditions.
25 He would be given an opportunity, for which he would be

1 grateful. And it would be devastating to him, to his case,
2 to his family, for him to do other than fully comply with the
3 orders of the Court. It is something that I can't even
4 imagine, Your Honor. Thank you.

5 THE COURT: Thank you. I did hear, obviously,
6 the Simpson hearing, and I am familiar with the facts, and
7 those are the facts upon which I based my previous decision.

8 One of the concerns I have is whether
9 there is some material change of circumstances now that
10 should justify a modification of release conditions. So I
11 need to think about that. I need to think about the other
12 things that you've presented. I am going to take the matter
13 under advisement at this time.

14 I think, clearly, if the death penalty
15 were off the table, that would be some material change of
16 circumstances. So I think something rides on that
17 presentation that's made. I guess I am not certain that I
18 will get a ruling out to you before I conduct that hearing,
19 based on further determinations about whether the death
20 penalty is applicable or not after the Chronis hearing.

21 So that matter is under advisement. I
22 will confirm it, then, at the next setting.

23 I will try, in the meantime, to get ahold
24 of Judge Darrow with regard to Mr. Butner's conflicting
25 matter, so that he can have some -- perhaps have some time,

1 instead of beating him to the current week that is set in
2 November.

3 MR. SEARS: In your spare time, Your Honor, do
4 you want to take a look at these books or a representative
5 sampling thereof?

6 THE COURT: I can take a look at a
7 representative sampling. Either side wants me --

8 MR. BUTNER: They are in evidence right now,
9 Judge.

10 THE COURT: Can you stick around for just a
11 couple of minutes, Mr. Butner, and I will take a look at
12 them?

13 Mr. Sears, you want to stick around?

14 MR. SEARS: I am here.

15 THE COURT: Mr. Sechez needs to stick around.
16 I guess I don't need you, Mr. Butner. If you choose to stay,
17 that is fine.

18 I will conclude this hearing so I can
19 proceed with the other couple, three hearings I have set,
20 without delaying those folks.

21 (Whereupon, these proceedings were concluded.)

22 ***o0o***

23

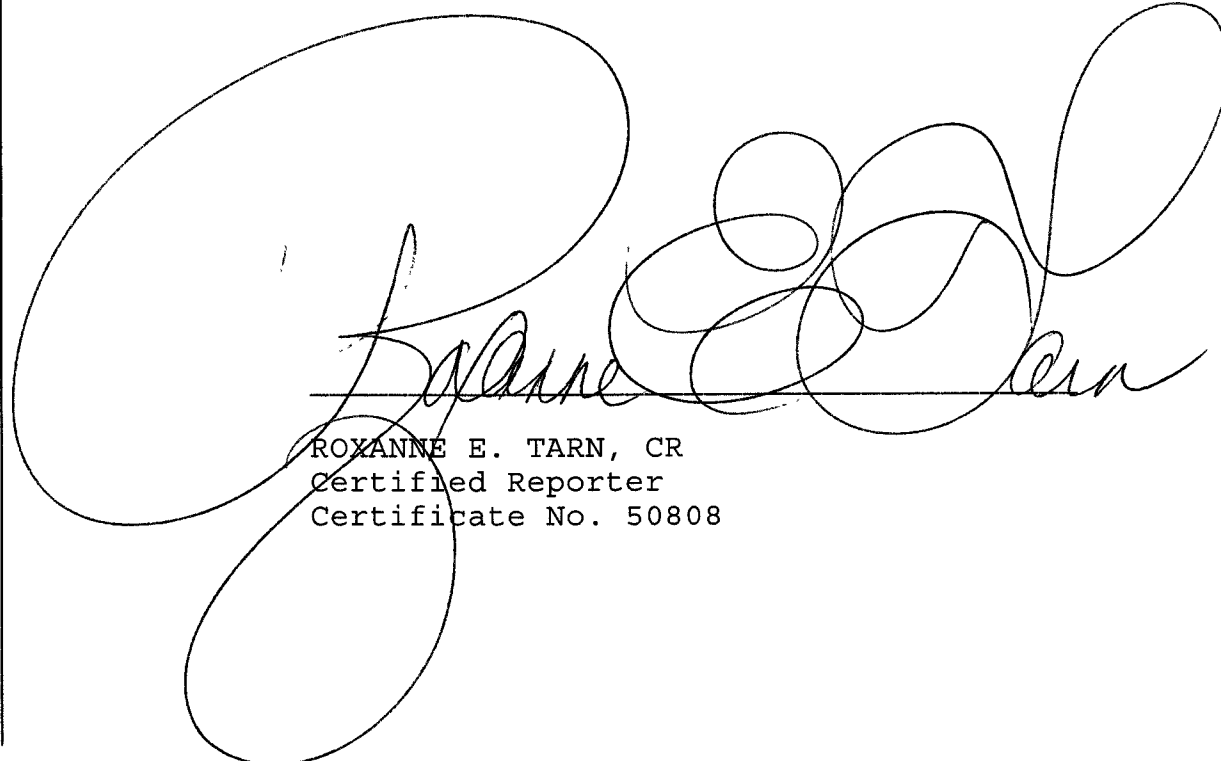
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C E R T I F I C A T E

I, ROXANNE E. TARN, CR, a Certified Reporter
in the State of Arizona, do hereby certify that the foregoing
pages 1 - 71 constitute a full, true, and accurate transcript
of the proceedings had in the foregoing matter, all done to
the best of my skill and ability.

SIGNED and dated this 15th day of December,
2009.



ROXANNE E. TARN, CR
Certified Reporter
Certificate No. 50808